deregulation-oriented Commission reevaluated the doctrine in light of modern media conditions and courageously eliminated it as both unnecessary and inimical to First Amendment values.[83]

Our system of a highly regulated broadcast medium originated early in the last century as an overreaction to the chaos of a medium emerging without an effective means of ensuring necessary property rights in use of the spectrum. At the time, the new technology was poorly understood -- Congress was regulating the "ether" -- and its potential vastly underappreciated.[84] Moreover, First Amendment jurisprudence was in its infancy. All this has changed dramatically. The digital information age of the 21st century, with a mature notion of the importance of a free press, bears little resemblance to a nostalgic view of a bygone "golden age of television." The "public interest" in a dynamic, digital, electronic age of media abundance demands that broadcasting finally emerge from its constrained status as a governmentally regulated utility and join the ranks of the free press.[85]

E. The FCC Should Expand and Strengthen Public Broadcasting While Deregulating Commercial Television

Finally, with regard to many aspects of public interest regulation, the era of digital television offers a clear, less speech-restrictive alternative. This alternative is based upon a simple but powerful idea presented to the Gore Commission by its member Robert W. Decherd,[86] that was enthusiastically received at first but subsequently buried in the Commission's Final Report.[87] The key elements of this plan rely on the two 6 MHz channels, one analog and one digital, that

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[83] *See* 1985 Fairness Doctrine Report, 102 F.C.C.2d 143 (1985); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

[84] *See CBS v. Democratic Nat'l Comm.*, 412 U.S. at 144 (Stewart, J., concurring).

[85] More than a quarter-century ago the Supreme Court recognized that, with an industry as technologically dynamic as broadcasting, regulatory approaches could quickly become outmoded. *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 117.

[86] Mr. Decherd is Chairman of the Board, President, and CEO of Texas-based A. H. Belo Corporation, which owns 17 network-affiliated television stations, three local or regional cable news channels, and six daily newspapers.

[87] Final Report, at 50-52.

public television stations, like all broadcasters, will operate during the transition to digital transmission. Once the transition to digital is complete, broadcasters will have to relinquish the analog channel. The Decherd plan, however, would allow one PBS station in each market to retain (and presumably digitize) this second channel to devote to educational and instructional purposes appropriately defined, perhaps in cooperation with state and local school authorities, and perhaps on an interactive basis.[88] This second 6MHz of spectrum, especially if eventually multiplexed, also could be used for public access by independent program producers, local community public access, free air time for political candidates, and other non-entertainment public interest purposes.

The attraction of this scheme is that it seems to offer great promise at little immediate cost; foregoing the recapture of one additional 6 MHz channel per market seems easy for the government to bear. But the plan is hardly free from difficulties. Some governmentally related entity necessarily would be responsible for apportioning the additional spectrum among applications for it based, presumably, on the programming such applicants would propose to present.[89] The Corporation for Public Broadcasting might be the natural choice (in coordination with the FCC) for implementing this plan. But without adequate programming, and therefore the assured funding to develop and support that programming, the proposal collapses. To make the plan viable, therefore, Congress most likely would have to assure proper financing in a sophisticated way that would maintain the editorial independence of the stations while holding them accountable for their use of taxpayer dollars.[90] If current PBS stations and the proposed additional stations truly serve the public

[88] As the plan was originally formulated, it is not clear just what would comprise such educational programming or how localized or targeted to currently underserved audiences it should be. But the idea is that this programming clearly would be different from and complementary to that already available on PBS stations.

[89] Existing PBS stations might be given some preference in this regard, with some choice necessary in those markets with more than one PBS station. And, to maintain competition and keep such stations from viewing the additional channel as an entitlement regardless of how well they use it, other entities such as universities, libraries, or other media providers might be invited to submit bids for the spectrum, again based on programming.

[90] Here some imaginative ideas include earmarking for this purpose the revenues raised from fees digital commercial broadcasters are to pay for ancillary and supplementary uses of their new digital spectrum and from the anticipated auctions of reclaimed and repackaged analog spectrum.

interest, and not just some bureaucratic (and perhaps elitist) notion of the public interest, then the idea should be popular enough that Congress would be willing to adequately fund both current PBS operations and the proposed new channels.[91] Willingness to pay is a good measure of perceived worth; the "public interest" should not have to depend on some seemingly costless and unaccountable appropriation from commercial broadcasters. And the burden of establishing the public benefit of an expanded public broadcasting system should be spread among the public at large and not disproportionately imposed on commercial broadcasters.[92]

The Decherd proposal holds wonderful promise, yet the problems to be overcome to actually implement it are neither inconsequential nor insurmountable. The Media Institute therefore urges the FCC to abandon the expansive regulatory agenda of the NOI that makes no sense for the 21st century and instead devote the Commission's substantial expertise, talents, and resources to developing and presenting to Congress a practical, economically sound, and politically feasible plan modeled on the Decherd proposal.

But a necessary, integral component of this plan must be the comprehensive, concomitant deregulation of commercial broadcast television. A fundamental fallacy has pervaded broadcast regulation, namely that there are "good" and "bad" broadcasters and that the government must assure through "one-size-fits-all" regulation that all broadcasters are, by its definition, at least minimally "good."[93] There are, to be sure, good and bad broadcasters, just as there are good and bad newspapers. But it is not the role of the state to identify the bad and to "improve" them; if the

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[91] While government subsidies for speech are not free of First Amendment concerns, there is considerably more flexibility for government action here than with direct regulation of speech. *See National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

[92] See Thomas G. Krattenmaker and Lucas A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1732 & n.65 (1995) (if a media marketplace is perceived as "impoverished," "subsidies may be an effective way of correcting its inadequacies, so long as these are true subsidies rather than extractions from media competitors"; "[t]o be a subsidy the costs must be spread generally").

[93] *See* NOI, Separate Statement of Commissioner Gloria Tristani. *But see Lutheran Church-Missouri Synod v. FCC*, 114 F.3d 344, 355-56 (D.C. Cir. 1998) (the FCC's "purported goal of making a single station all things to all people makes no sense").

First Amendment means anything it precludes such state involvement. There is a long and unhappy history of government regulation of broadcasting[94] that should give great pause to anyone contemplating further tinkering; the likelihood is that things will be made worse, not better. A *free* press must include room for the mainstream and the elite, the boorish and the nonconformist, the traditionalist and the maverick, and even for irresponsible, rogue elements, both because this is the only way to assure true journalistic freedom and because all such elements make a real contribution to our wide-open, uninhibited, and uniquely robust free speech cacophony.

The additional public channels created under the Decherd proposal, together with traditional PBS stations and the programming many commercial broadcasters and abundant other media already willingly provide, would be more than sufficient to satisfy any reasonable "public interest" in broadcasting.[95] Whatever this public interest is, it is at most an interest in having certain programming readily available across the media marketplace, not an interest in forcing every media player to conform to an official standard of professionalism.[96] And it is certainly not an interest in coercing, or even inducing, the American public to watch that which some government officials think people ought to watch. The FCC and the American public should rely on willing, capable, and passionate public broadcasters, and similarly inclined other media programmers, rather than continuing to force unwilling and less-well-suited commercial broadcasters into a common, bureaucratically defined "public interest" mode.[97]

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[94] *See* Thomas G. Krattenmaker and Lucas A. Powe, Jr., REGULATING BROADCAST PROGRAMMING (1994); Lucas A. Powe, Jr., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987).

[95] *See* Eli Noam, *Public Interest Programming by American Commercial Television* (December 1997) (describing the huge growth and wide availability of public interest programming on commercial television, both broadcast and multichannel).

[96] Paraphrasing Alexander Meiklejohn, what is essential is not that every broadcast station serve all aspects of the officially declared public interest, but that the true public interest is served across the entire media landscape. *See* Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, at 25 (1948).

[97] As Gore Commission Member Frank H. Cruz, vice chairman of the board of directors of the Corporation for Public Broadcasting, put it: "Strengthening public broadcasting will maximize the educational impact of digital television far more readily than imposing additional operational mandates on reluctant commercial broadcasters." Frank H. Cruz, *Recommendations to*

The FCC would need compelling evidence -- evidence that does not exist beyond the mere desire of some -- that anything more is required to fully serve any conceivable 21st century public interest in broadcast television. Indeed, the additional available alternatives for all sorts of public interest programming that these new public channels and other burgeoning media represent would render the continuation of public interest obligations on commercial broadcasters especially suspect as a constitutional matter.[98]

V. THERE CAN BE NO LINKAGE BETWEEN PUBLIC INTEREST OBLIGATIONS AND DIGITAL MUST-CARRY

The Media Institute takes no position here on the complex issue of must-carry for digital broadcasters that is the subject of a separate, ongoing FCC proceeding.[99] That issue, however, must be considered entirely on its own merits; there can be no linkage between current or additional public interest obligations on broadcasters and their entitlement to any degree of digital must-carry. Some broadcaster members of the Gore Commission clearly were pursuing a digital must-carry agenda,[100] and Commissioner Gloria Tristani's Separate Statement in the NOI also raises the specter of a relationship between digital must-carry and public interest obligations.[101] Any such "deal" would be wholly inappropriate.

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the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters: Strengthening Public Television for the Digital Age (June 8, 1998).

[98] *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (plurality) (1996) (even under less than strict scrutiny, the availability of reasonable alternatives is fatal to speech-restrictive government regulation).

[99] Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 15092 (July 10, 1998).

[100] *See* James F. Goodmon, *A Proposal for a Minimum Level of Public Interest Requirements for All Stations and A Voluntary Broadcaster Code of Conduct*, June 8, 1998, at 7 (urging digital must-carry so cable subscribers can "benefit from the public interest programming of the digital broadcaster"); Final Report, at 83, 84, Separate Statement of Barry Diller (urging digital must-carry); Transcript, Nov. 9, 1998, at 150-51 (remarks of Barry Diller) (suggesting minimum public interest obligations for broadcasters in exchange for digital must-carry).

[101] NOI, Separate Statement of Commissioner Gloria Tristani.

For decades broadcasters have been "volunteered" into complying with all sorts of government mandates, most recently V-chip ratings and children's television processing guidelines.[102] As Commissioner Furchtgott-Roth has noted, "voluntary standards" have been a "favored tool" of FCC broadcast regulation but "provide a dangerous mechanism for the evasion of statutory limits on delegated authority."[103] The Commission cannot now purchase "voluntary" public interest obligations from broadcasters as a condition for particular results in the Commission's digital must-carry proceeding. Among other problems, such an approach would run headlong into the murky doctrine of unconstitutional conditions whereby "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[104]

Moreover, such an approach would undermine the validity of all must-carry rules. A sharply divided Supreme Court sustained the current must-carry rules only because a bare majority determined the rules are content-neutral and not based upon any particular nature of the programming on broadcast television.[105] Must-carry survived only because its purpose is simply to preserve free, local, over-the-air television regardless of its content. The Court noted that at most

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[102] *See* Robert Corn-Revere, *"Voluntary" Self-Regulation and the Triumph of Euphemism* in RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (The Media Institute, 1997, Robert Corn-Revere, ed.). In an earlier era this was regulation of broadcasting by a mere "raised eyebrow" of official disapproval. *See Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 407-08 (D.C. Cir. 1975) (statement of Bazelon, C.J.) (describing as "legion" a "whole range of 'raised eyebrow' tactics" of FCC regulation). *See also* Charles D. Ferris, Frank W. Floyd, and Thomas J. Casey, CABLE TELEVISION LAW, ¶ 3.11 n.5 (1985) (describing the origin of the "raised eyebrow" view of FCC regulation). *See generally* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WISC. L. REV. 873 (1997).

[103] Harold Furchtgott-Roth, *Voluntary Standards Are Neither*, remarks before The Media Institute's Communications Forum luncheon (Nov. 17, 1998) <www.fcc.gov/commissioners/furchtgott-roth/sp.html>. *See also Lutheran Church,* 141 F.3d at 349 (describing FCC's "unusual legal tactics" when it wishes to avoid judicial review).

[104] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). *See FCC v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating as unconstitutional a statutory provision requiring that public broadcast stations that receive federal funds from the Corporation for Public Broadcasting not "engage in editorializing").

[105] *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1184 (1997).

only a system of "minimal" broadcast regulation can withstand constitutional scrutiny. Indeed, "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."[106] Any *quid pro quo* of digital must-carry in return for broadcasters accepting additional public interest obligations would violate these basic principles.

VI. THERE IS NO BASIS FOR ANY INTRUSIVE GOVERNMENT REGULATION IN ANY OF THE FOUR AREAS SPECIFICALLY TARGETED IN THE NOI

The Media Institute believes it is important for the record to be clear as to the highly problematic background and genesis in the Gore Commission of the proposals set forth in the NOI. Nonetheless, any specific public interest proposals must stand or fall on their own merit. The problem with the four areas discussed in the NOI is that while they may contain some nice, utopian ideas, there is no merit to any additional government regulation of broadcasting. That is, there is no justification, as there must be, for government mandates. This is the central point: No longer can broadcasting be regulated, consistent with the First Amendment, as a public utility subject to whatever "good" ideas regulators propose. If "good" ideas were all it took to "improve" a free press we ought to start with reform of the supermarket tabloids.[107] As Commissioner Furchtgott-Roth so trenchantly characterizes the NOI, it is largely just a "laundry list ... of 'freebies' to be extracted from broadcasters for various 'public' purposes -- most of questionable utility and legality." The NOI's "roving mandate to seek out 'good' things that we can make broadcasters do" has "little connection to broadcasting at all" let alone to the transition to digital. The "proposals are breathtaking in scope ... [with] dreams of creating a new Great DTV Society"; the NOI seeks to "cure virtually every social ill through the mandated largesse of broadcasters."[108] The Media

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[106] *Turner Broadcasting*, 512 U.S. at 650.

[107] *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) (government is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one").

[108] NOI, Furchtgott-Roth Separate Statement.

Institute wholeheartedly shares these views; others may not. The essential point, however, is that the FCC cannot meet the applicable stringent standards for any of the sorts of new regulations discussed in the NOI.

A. Multicasting and Ancillary and Supplementary Services

The only aspects of the NOI that are at all related to the transition to digital broadcasting, and therefore to the reason for the NOI, are the opportunities in a digital system for broadcasters to multicast and provide ancillary and supplementary services. This latter set of services may generate fees [109] that the FCC might then use, under appropriate standards, to subsidize other programs such as the additional public stations contemplated by the Decherd proposal discussed above. But there is no basis for imposing generalized public interest obligations on these services, nor, in the age of Internet communications, for making broadcasters quasi common carriers for datacasting on behalf of certain favored public entities.[110] Whatever benefit broadcasters may derive from providing ancillary and supplementary services, beyond the fees they must pay, may help them compete and survive in the new and increasingly competitive video marketplace.[111] (But, as with all aspects of the transition to digital, it is not at all clear that broadcasters will derive *any* long term net benefit.) If they are successful at this, it will be because broadcasters truly serve the public interest as best measured in the media marketplace and not by a government agency.

As for multicasting, there is considerable irony in considering that throughout the 20th century the only mantra for regulating broadcasting in the face of the First Amendment was broadcasting's alleged peculiar characteristic of scarcity. Now that digital broadcasting brings the

[109] *See* Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, MM Docket No. 97-247, *Report and Order*, 14 FCC Rcd 3259 (1998), *reconsid. denied*, 1999 LEXIS 5969 (Nov. 24, 1999).

[110] *See* NOI, at ¶ 13.

[111] Even the Gore Commission realized that Congress chose to structure the transition to digital so as to strengthen the competitive position of broadcasting and ensure the survival of universally available, free, over-the-air television. Final Report, at 9. Thus it is particularly perplexing why that Commission, or now the FCC, would defeat that key purpose by saddling broadcasters with a new set of intrusive and burdensome regulations.

prospect of multiplying several-fold the number and diversity of broadcast stations, one would think the logical and natural response would be to reduce if not eliminate regulation, not increase it. As broadcasters become multicasters, they approach the narrowcasting strategy of cable operators. Rather than programming one channel largely with bland programming to attract a large common-denominator audience, digital broadcasters will be able to appeal to different audiences on different channels. Thus even with common ownership, a multicaster should add considerable diversity to the airwaves in response to market forces, not governmental edict. In a world of media abundance it would be unfortunate enough to continue, let alone increase, the full panoply of public interest obligations on a digital broadcaster's "primary" channel; it makes no sense whatsoever to extend such mandates to other channels in the digital age of unlimited viewer choice and ample opportunity for niche programming.

B. Community Responsiveness

The same expanded opportunities for broadcasters to program multiple, diverse channels will enable them to better serve the interests and needs of their viewing public as best determined in the competitive marketplace. Broadcasters will have to do this in order to survive in a vastly transformed and converging world of electronic communication. If the public finds it is not being well served by broadcasters, audiences will quickly migrate, as many already have, to a plethora of alternatives that are readily available, both physically and economically. And if other media entities displace broadcasters as the main sources of information, education, and entertainment -- that is, if a majority of the public finds itself better served elsewhere -- that is not a proper concern for a government agency.[112]

[112] At least it is not a concern to be addressed by programming regulation as opposed, perhaps, to content-neutral subsidies such as support for public broadcasting or the must-carry rules.

1. Disclosure Obligations

There is, thus, no basis for enhanced disclosure obligations covering broadcasters' public interest programming and activities. To begin with, it is not as though broadcasters' programming is secret information that needs government mandates to be brought to light as with, say, campaign contributions. The public seems to know full well how to find the programming it desires throughout the expanding video marketplace. Media critics also suffer no lack of information. Moreover, the kind of enhanced disclosures and standardized check-off forms discussed in the NOI seem to be relatively innocuous but in fact mask a pernicious, intended effect.[113] Who determines the categories to be covered? Why, for example, should there be a category for "contributions to political discourse" or "programming that meets the needs of underserved communities" (whatever these latter might be) and not a category for, say, "sports programming"? Who determines what counts as "public interest" programming and on what basis? Whoever chooses the favored categories of programming demanding quantified responses exerts subtle but real pressure on broadcasters' editorial policies. Broadcasters will be pressured into developing and categorizing their programming in a way designed to avoid low figures in the officially approved lexicon. Though in any given category half of broadcasters will be below average, none will want to be so described by the agency that renews its license or by "public interest" pressure groups. The coercive pressure of such guidelines is the real point of the proposed enhanced disclosure requirements, but such pressure is quite inappropriate.[114] In the digital age of unlimited viewer choice, the only "disclosure" necessary of how well a broadcaster is serving the public interest are figures about its market share; these say it all.

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[113] NOI, at ¶ 15.

[114] *See Lutheran Church*, 141 F.3d at 352-53 (describing improperly coercive effect of FCC equal employment opportunity guidelines).

2. Disaster Warnings

No one can quarrel with the government's desire to provide an efficient and effective system for disaster warnings, but the disaster warning issues the NOI raises[115] are especially noteworthy for their focus solely on television broadcasters. In this regard this narrow issue well illustrates that broadcasting can no longer be treated, practically or constitutionally, as a peculiar medium of communication. In a digital age of instantaneous electronic communications by cable, satellite, the Internet, and wired and wireless cellular telecommunications, does broadcast television really have such a unique role to play in providing real-time disaster warnings? Aren't some of these other technologies -- paging systems, for example -- as least as well or even better suited to this task in many situations? And if we are to develop a truly efficient, enhanced system of disaster warnings, isn't the best role for government one of coordinating and encouraging through subsidies its rapid implementation? These are the more appropriate issues for an NOI.

C. Enhanced Access to the Media

As with disaster warnings, it is impossible to quarrel with the ultimate aim of enhancing access to the media by people with disabilities. But again, there are real questions as to the appropriate role of government. On the one hand, enhancing media access by people with disabilities expands the audience market for any media entity. In the current hotly competitive video market, therefore, there should be considerable market incentives for broadcasters as well as others to expand the availability of their products through closed captioning, video description, and similar services. On the other hand, at some point it may become uneconomical for a broadcaster to implement additional such measures to marginally increase its potential audience among a particular group. If so, we again urge that the FCC not think reflexively, as it has for so many decades, simply in terms of what it thinks it can force broadcasters to do as opposed to creative approaches to government subsidies to encourage greater opportunities.

[115] NOI, at ¶¶ 18-19.

While the ultimate goal of enhanced access surely is laudable, government mandates are hardly free from difficulty. Could the government, for example, require the NEW YORK TIMES to provide, at no cost, sight-impaired readers with a large-type print or braille edition, or an audio cassette, if the company itself were unwilling to do so? After all, such access to this country's premier newspaper of record is arguably far more important than comparable access to most of the daily fare on broadcast television. Can some entities heavily associated with the Internet -- Microsoft, for example, or an online provider such as America Online -- be required to develop and distribute software enabling visually impaired persons to use the Internet? The constitutional problem is particularly acute for video description, which the Commission is currently considering.[116] Video description would require broadcasters and other programming distributors to actually create the speech -- the narrative descriptions of key visual elements such as settings, gestures, costumes, and actions not otherwise reflected in a program's dialogue -- they then are forced to disseminate. Such requirements are particularly offensive to basic notions of free speech and a free press.[117]

Instead of pursuing its usual regulatory mode, we urge the FCC to look for guidance to abundant examples worldwide of how software (and hardware) has been developed -- largely through private efforts with perhaps some organizational or government support in the form of research and development or subsidies -- to make computers, and especially the Internet, readily available to people with all sorts of disabilities.[118] Electronic media technologies are rapidly

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[116] Implementation of Video Description of Video Programming, MM Docket No. 99-339, *Notice of Proposed Rulemaking* (Nov. 18, 1999).

[117] *See Hurley*, 515 U.S. at 573-74 ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.... [O]ne who chooses to speak may also decide 'what not to say.' ... [T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.").

[118] *See, e.g.*, information about IBM's Home Page Reader that "orally communicates web-based information just as it is presented on the computer screen" available at <www.austin.ibm.com/sns/hpr.html> and <www.austin.ibm.com/sns/ hprctg.htm>; Debra Nussbaum, *Web Access for the Blind*, N.Y. TIMES, Dec. 10, 1998, at D10; Constance Holden, *Leveling the Playing Field for Scientists With Disabilities*, SCIENCE, Oct. 2, 1998, at 36; Judy Siegel, *A Seeing-Eye Mouse*, JERUSALEM POST (N. Amer. ed.), Jan. 11, 1999, at 15 (start-up Jerusalem company has developed

converging in the digital era,[119] and government support and encouragement for the willing endeavors of many media entities,[120] not constitutionally troubling mandates, is the proper approach to achieve the undoubtedly important and worthwhile goal of increasing access.

Indeed, there is an additional, crucial salutary effect of adopting such an approach in this area in which, unlike many other aspects of public interest obligations, everyone can agree that the goal is extremely important and highly laudable. Regulation is the natural, first response. But staying the regulatory hand even here will begin to reverse the peculiar mindset that is no longer tolerable, namely that of a broadcast media, ostensibly an important segment of this country's free press, yet subject to the will of a federal agency in the name of an amorphous public interest.[121]

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hardware and software system allowing blind to "feel" graphics on a computer screen, "read" any alphabetical text from a program or the Internet, and even play games). *See generally* Telecommunications Access Advisory Committee, *Access to Telecommunications Equipment and Customer Premises Equipment by Individuals with Disabilities,* Final Report, January 1997.

[119] *See, e.g.*, Rik Fairlie, *Television and the Net Converge*, N.Y. TIMES, Jan. 16, 2000, at Sec. 2, p. 1; Clea Simon, *The Web Catches and Reshapes Radio*, N.Y. TIMES, Jan. 16, 2000, at Sec. 2, p. 1.

[120] *See generally* Thomas W. Holcomb, Jr., *The Art of Reading Television*, N.Y. TIMES, Jan. 31, 2000, at C15.

[121] Eliminating this mindset is especially crucial when the FCC inappropriately flirts with the highly charged notion of increasing "diversity" in viewpoint and programming on broadcast television. NOI, at ¶¶ 29-33. As one court recently put it, all too often government "intonation of the rubric 'diversity' is a thinly disguised reference to its preference for [certain] editorial content." *Time Warner Cable v. New York*, 943 F. Supp. 1357, 1397 (S.D.N.Y. 1996), *aff'd*, 118 F.3d 917 (2d Cir. 1997). If anything clearly should be constitutionally off-limits to federal regulators it is the idea of even considering tinkering with such an undefined and undefinable notion as "diversity." *See Lutheran Church*, 141 F.3d at 354-55 ("The Commission never defines exactly what it means by 'diverse programming.'" And, "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment"). *See also* Review of the Commission's Regulations Governing Television Broadcasting, *supra* note 50, Dissenting Statement of Commissioner Harold Furchtgott-Roth (noting the "lack of any benchmark for measuring diversity" and that the FCC "has failed to define the substance of the term 'diversity'");1998 Biennial Regulatory Review, *supra* note 45 at 11304, Separate Statement of Commissioner Michael Powell (diversity is a "visceral matter -- bathed in difficult subjective judgments and debated in amorphous terms. It has always been difficult to articulate clearly the government's interest in 'diversity.'").

D. Political Discourse

The immediate impetus for creation of the Gore Commission was the Administration's acknowledged desire to devise a means and rationale to require television broadcasters, alone among the media, to provide free air time for political candidates. This is particularly curious because, while the need for campaign finance reform may be real, this problem has little to do with broadcasting *per se* and absolutely nothing to do with broadcasters' conversion to digital. So, there is no rationale for imposing new obligations now on broadcasters other than the fact that some people think it a good idea and, as usual, broadcasters are an easy target. But a good idea is not sufficient justification for controlling the editorial discretion of broadcasters. And, as Commissioner Furchtgott-Roth notes, "free" air time is not a good idea; it is "just bad policy." It will simply shift costs of campaigning from candidates' willing contributors to the decidedly unwilling broadcast industry and American consumers.[122]

The idea of requiring any form of free air time for candidates is not only pragmatically, statutorily,[123] and constitutionally highly dubious[124] but, as the NOI indicates, it is politically contentious and a minefield for the FCC. Especially considering the unfortunate appearance created by the timing of this NOI and the ongoing presidential campaign, The Media Institute respectfully suggests that this issue should not be before the Commission.

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[122] NOI, Furchtgott-Roth Separate Statement.

[123] *Id.* n.4

[124] *See* Rodney A. Smolla, *Free Air Time for Candidates and the First Amendment,* Paper No. 2, ISSUES IN BROADCASTING AND THE PUBLIC INTEREST (The Media Institute, 1998); Douglas C. Melcher, *Free Air Time for Political Advertising: An Invasion of the Protected First Amendment Freedoms of Broadcasters*, 67 GEO. WASH. L. REV. 100 (1998). Lillian R. BeVier, *Is Free TV for Federal Candidates Constitutional?*, American Enterprise Institute (1998) (distributed as an attachment to P. Cameron DeVore, *The Unconstitutionality of Federally Mandated "Free Air Time,"* submitted to the Gore Commission on March 2, 1998).

The constitutional guarantee of free speech has its "fullest and most urgent application" in political campaigns.[125] The FCC would bear a "well-nigh insurmountable" burden to justify further interfering with how broadcasters cover campaigns or provide candidates with air time.[126] The Commission would have to satisfy exacting scrutiny by demonstrating a compelling interest that is both narrowly tailored and necessary;[127] the Commission cannot do so.[128] This alone is overwhelming reason for the Commission to proceed no further.

Moreover, as the NOI acknowledges,[129] broadcasters themselves, as a matter of professional journalism, are experimenting with various new and better methods for covering political campaigns, at least at the federal level.[130] They should be left free to continue in these efforts and not impeded by government intervention. We certainly do not need more 30- and 60-second political ads that candidates might choose to run if they are available free of charge. But just what is the "candidate-centered discourse" that some promote?[131] Assuming, as is unlikely, that it can be adequately defined, why is this the favored form of campaign speech? And who will monitor compliance and how? The very best thing the FCC can do to encourage and promote voluntary efforts by broadcasters to enhance the political information and debate available to the

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[125] *Brown v. Hartlage*, 456 U.S. 45, 53 (1982), *quoting Monitor Patriot C. v. Roy*, 401 U.S. 265, 271-72 (1971).

[126] *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (state prohibition against paying circulators of initiative petitions violates First Amendment).

[127] *Id.* at 420, 426; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). The NOI at ¶ 34 relies on *Arkansas Educational Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1640 (1998), but the Court there upheld the discretion of the broadcaster as to how it handled campaign coverage, specifically debates.

[128] Indeed, it is not even clear that old, limited statutory provisions such as 47 U.S.C. §§ 312(a)(7) and 315 could survive reexamination in the current radically transformed media environment.

[129] NOI, at ¶ 35.

[130] And broadcasters are hardly the only, or even still the most important, sources for campaign coverage. *See, e.g.*, Joe Schlosser, *CNN's Kind of Story*, BROADCASTING & CABLE, March 13, 2000, at 54 (CNN is pulling out all the stops in coverage of presidential campaigns).

[131] NOI, at ¶ 37.

public is to remove the threat of any additional regulation, a threat that will only stifle such efforts for fear they will be turned into mandates.

Appropriate competitive forces also are at play as, increasingly in just the last couple of years, a great deal of political information, communication, and debate has shifted to the Internet. There now is a "booming, buzzing electronic bazaar of wide-open and uninhibited free expression."[132] Incredibly, the Gore Commission, charged to look to the digital future, refused to consider this single most revolutionary change in the electronic information age especially as it can promote truly meaningful communication with voters.[133] The FCC should not perpetuate this error, as the increasingly important roles of the Internet and cable television in covering politics may indicate a correspondingly diminishing role for broadcast television and belie any need for constitutionally troubling regulation. As with so much current regulation of broadcasting, the FCC should begin *de novo* with empirical reconsideration of broadcasting's current role as one among many burgeoning forms of electronic media, and with renewed appreciation of constitutional first principles.

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[132] Smolla, *supra* note 124, at 5.

[133] *See* Tina Kelley, *Candidate on the Stump Is Surely on the Web*, N.Y. TIMES, Oct. 19, 1999, at 1; Rebecca Fairley Raney, *Politicians Woo Voters On the Web,* N.Y. TIMES, July 30, 1998, at D1. *See generally* THE DEMOCRACY NETWORK (DNet) at <www.dnet.org> created by the Center for Governmental Studies and the League of Women Voters Education Fund. DNet is an interactive and unfiltered Web site "designed to improve the quality and quantity of voter information and create a more educated and involved electorate.... DNet encourages candidates to address a wider range of issues, and to address those in greater depth, than they might in other media. Our goal is to increase voter understanding of important public policy problems, allow candidates to debate their positions in an "electronic townhall" before online audiences, reduce the pressure on candidates to raise campaign funds, foster greater civic participation and interaction between voters and candidates, and create new online political communities."

VII. CONCLUSION

As Justice Stewart once noted, "[t]here is never a paucity of arguments in favor of limiting the freedom of the press."[134] For historical and other reasons, our legal system came to accept, for most of the 20th century, the notion that broadcasting was somehow unique and that it was appropriate to treat the industry more like a regulated utility than a free and vibrant part of the press. The law can no longer continue in this vein;[135] times are changing at an ever-accelerating pace. The revolutionary transformations in media and communications we are experiencing as we begin the next millennium require us to rethink our regulatory approach to broadcasting and return to first principles. Once again Justice Stewart is being proved correct; there is a plethora of voices and rationales being advanced to hold onto an old, familiar, and, to some, comfortable regulatory system. The challenge, however, is to address outdated assumptions with a fresh skepticism and the essential command of the First Amendment firmly in mind.

The Media Institute therefore urges the Commission to abandon its outmoded current NOI in favor of a new approach focusing on expanding and strengthening public television as discussed above, while finally welcoming commercial broadcasting to the ranks of a truly free press. This would be a meaningful and fitting fulfillment in the 21st century of the FCC's historic mandate to advance the true public interest.

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[134] *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 144 (Stewart, J., concurring).

[135] *See* Commissioner Michael K. Powell, *Technology and Regulatory Thinking: Albert Einstein's Warning*, speech before the Legg Mason Investor Workshop, Washington, D.C. (March 13, 1998) <www.fcc.gov/commissioners/powell/> (describing as no longer tenable the "regulatory balkanization [that] was sustainable in the era before digitalization").

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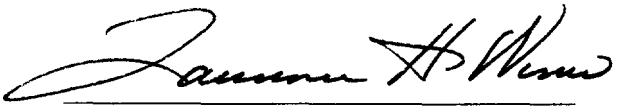
Respectfully submitted,



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